BERKELEY & HARRISON v. GREEN, TRUSTEE.*

Supreme Court of Appeals: At Richmond.

January 28, 1904.

Absent, *Cardwell,* J:

1. TRUSTEES—*Employment of counsel—Right of counsel to fees agreed.* If a trustee, in pursruance of express authority conferred by the deed of his appointment, employs counsel to aid him in the execution of his trust, and agrees to pay him a definite fee, such counsel has the right to have that fee paid to him out of the trust fund, and is not required to litigate the question of the value of his services in the absence of all suggestion of fraud or collusion between him and the trustee.
2. EQUITY—*Allegation and proof—Counsel fees.* Upon a petition filed by counsel for a trustee praying to be allowed out of the trust fund a definite fee agreed by the trustee in good faith to be paid to him, the value of the services rendered are not in issue.
3. TRUSTEES—*Right to employ counsel.* Even where a deed does not expressly authorize it, a trustee may in good faith employ counsel to advise and assist him in the discharge of his duties, and may pay them out of the trust fund reasonable compensation for their services.

Appeal from a decree of the Corporation Court of the City of Danville in a suit in chancery under the style of *Johnston & Check* v. *Green, Trustee, and Others,* in which appellants filed their petition. *Reversed.*

The opinion states the case.

Frank W. Christian, Thomas Hamlin and *Berkeley & Harrison,* for the appellants.

Peatross & Harris, E. E. Bouldin, Guthrie & Guthrie, Julian Meade, Withers & Green, C. U. Williams, Cabell, Cabell & Custer and *James L. Tredway,* for the appellees.

WHITTLE, J., delivered the opinion of the court.

The controversy on this appeal is between appellants and creditors of the late John W. Holland with respect to a fee asserted by the former, as counsel for Berryman Green, trustee, against a trust fund under the control of the court.

It appears that John W. Holland, who had become liable as indorser for his brother C. G. Holland in the sum of $156,235.10,

*Reported by M. P. Burks, State Reporter.

conveyed a large amount of valuable property, real and personal, in trust to secure creditors holding indorsed notes, and other creditors of the grantor. The deed contains, among other stipulations, the following:

"It is understood and agreed that in the execution of his duties hereunder, the said Berryman Green, trustee, shall be authorized and empowered to employ counsel and compensate them for their services out of the trust funds."

By virtue of the foregoing provision, which is binding upon all creditors who have accepted the benefits of the deed, the trustee in good faith engaged appellants as his counsel to aid him in the execution of the trust. Thereupon a suit was instituted by them, in the name of the trustee, against the beneficiaries, to construe the deed, and to obtain the guidance and assistance of the court in the administration of the trust.

At the time of their retainer the amount of appellants' compensation was not fixed, but subsequently it was agreed between them and the trustee that they should be allowed a fee of $1,000, to be paid out of the trust fund. In pursuance of that agreement the trustee paid appellants $500 on account of their fee, and took a receipt from them to that effect. Afterward other trustees were substituted in the place of Berryman Green, and appellants presented a petition setting forth their contract with the original trustee, the payment made in accordance therewith, and praying that the balance of their fee might be audited and approved by the court, and decreed to be paid them out of the trust fund under its control. The court directed one of its commissioners in chancery to take and report the testimony bearing upon the transaction, and, upon a return of the evidence, entered the decree appealed from, declaring that the $500 already paid was a reasonable fee for the services rendered by appellants for the trustee, and dismissed their petition.

The trial court obviously disposed of the controversy on the theory that, upon a *quantum meruit,* appellants had already been adequately compensated for their services. But it must be observed that no such issue was made and submitted to the court either by the pleadings or evidence. Appellants relied in their petition upon an express contract between themselves and the trustee that they should receive $1,000 for their services, and that allegation is fully

sustained by the evidence. Indeed, there is practically no conflict between the testimony of appellants and that of the trustee with respect to the terms of the contract, and no countervailing evidence was adduced.

It is fair to presume that, if appellants had intended to rely upon an implied contract that they were to be compensated for their services upon a *quantum meruit,* they would have made that case in their petition, and have undertaken to prove the services rendered, and what such services were reasonably worth. Relying, however, as they had a right to rely, upon an express contract, reasonable in its terms, which the trustee was authorized by the deed to make, in the absence of any suggestion of collusion or bad faith, there was no necessity for appellants to have introduced evidence of the value of their services, other than that afforded by the agreement itself. Even where a deed does not expressly authorize it, a trustee may in good faith employ counsel to advise and assist him in the discharge of his duties, and may pay them out of the trust fund reasonable compensation for their services. *Cochran* v. *Richmond etc. R. Co.,* 91 Va. 339, 21 S. E. 664.

The administration of this trust necessitated the institution and prosecution of a litigated chancery cause, and involved debts and assets to the amount of several hundred thousand dollars. The trustee, himself a lawyer of experience and ability, was of opinion that the fee agreed upon was not unreasonable, and in that opinion this court concurs.

It follows from the foregoing views that the decree complained of is erroneous and should be reversed, and this court will enter such decree as the trial court ought to have entered, sustaining and enforcing the contract of the parties. *Reversed.*

EDITORIAL NOTE.—We report this case with a degree of satisfaction approaching pleasure. We are entirely serious in stating that as we recall the general line of decisions in this country, the tendency of the courts is to rule against their brethren of the bar. This is due, in some measure at least, to the fact that the world, the press and the devil are ever eager to seize upon anything in the nature of a Jarndyce suit and hold it up as an example of the rapacity of lawyers and a warning to litigants. The judicial pendulum has swung as a consequence too far in this direction, and we behold a most rigid scrutiny of lawyers' right and contracts—and, even if approved, a hesitation in judicially endorsing them at which we are compelled at times to wonder. We remember that years ago our attention was

first drawn to the subject by the case of *Ould & Carrington* v. *City of Richmond*, 23 Gratt. 464, upholding the right of a municipal corporation to charge attorneys with a license tax. The right was affirmed by a majority of only one judge, reversing the lower court, Staples and Bouldin, JJ., dissenting, and thus what is in reality a heavy city income tax, unknown in the counties of the state and, as we understand, in a majority of the states of the Union, whether from the standpoint of states, cities or counties, is imposed in the name of an occupation or privilege tax. We have never questioned, of course, the conscientiousness of the majority—but we would have felt more reconciled to the burden had the decision been unanimous.

We say that we give this decision a cordial welcome. The only fly in the ointment is that thirteen lawyers appear to have contested the right of their brethren to this just award—but after all, that is only another element in our satisfaction with the result. The court did its part by the bar in *Cochran* v. *Richmond etc. Ry. Co.*, cited in the opinion. In *Stoneburner* v. *Motley*, 95 Va. 784, it distinctly declined to adjudicate the question presented as to the propriety of the allowance to counsel, but emphasized the liability to abuse of the power of the court to grant counsel fees, declaring that it should be exercised *with the utmost caution and jealousy*, and now the principal case is an enunciation of a reasonable proposition to which the most cautious and jealous courts can no longer take exceptions. In *Baker* v. *Briggs*, 99 Va. 360, it was held that the amount of an attorney's fee to be taxed against the opposing party being regulated in certain suits in chancery by the amount in controversy, and this having been fixed by the trial court, the appellate court will not disturb it in the absence of anything in the record to show error. This and the principal case go to assure us that, with all the scrutiny that they will bestow upon the compensation of counsel, our courts, when satisfied that it is just, will approve and enforce its payment at its true worth—a claim of the first dignity.

The doctrine of the principal case is sustained by decisions of other courts. See *Clark* v. *Sawyer*, 151 Mass. 64, 23 N. E. 726; *Perry Mason Shoe Co.* v. *Sykes*, 72 Mass. 390, 17 South, 171, 28 L. R. A. 277; *Ingham* v. *Lindeman*, 37 Ohio St. 218; *In re Schlang*, 66 How. Pr. (N. Y.) 199. But where there is any evidence of unconscionableness, the charges have been almost uniformly disallowed. Thus, where an assigned estate, valued at about $2,500, realized less than $100 for creditors, showing a reckless mismanagement, counsel fees, stated to be "for consultations from time to time," were disallowed. *In re Levy*, 1 Abb. N. C. (N. Y.) 177. See, also, *In re Schaller*, 10 Daly (N. Y.) 57; *In re Felt*, 52 Hun, 60. It is a safe conclusion of the whole matter that the laborer is worthy of his hire, and that when, by his energy and learning, he has sown and brought to maturity a harvest for others, he should be allowed at least to follow after the reapers and gather for himself such a portion as his services are worth upon a *quantum meruit* or, as by express contract, he has agreed to accept.